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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Estate of TOKIE YORIE SAKAIDA, Deceased. _____ HENRY H. SAKAIDA, Petitioner and Appellant, v. NORMAN ISAMU SAKAIDA, Contestant and Respondent.	B249115 (Los Angeles County Super. Ct. No. BP127204)

APPEAL from an order of the Superior Court of Los Angeles County. James A. Steele, Judge. Affirmed.

Rutan & Tucker, David H. Hochner and Gerard M. Mooney, for Petitioner and Appellant.

O'Neill Huxtable & Abelson and Mary L. O'Neill for Contestant and Respondent.

_____

This appeal is from an order admitting a revised will to probate. The issue is whether substantial evidence supports the trial court's findings that the decedent had testamentary capacity and intent when she made the new will and that the will was not procured by undue influence. We conclude that appellant has forfeited his challenge, but that in any event the findings are supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Family and Family Business

John Takashi Sakaida (John) and Tokie Yorie Sakaida (Tokie) were married for almost 50 years. John had three sons from a prior marriage: Norman Isamu Sakaida (Norman), Henry H. Sakaida (Henry) and Richard Teruo Sakaida (Richard). Tokie raised the boys as her own; she had no other children. John was born in the United States and died in October 2004. Tokie was born in Japan and her primary language was Japanese. Tokie died in August 2010.

During their marriage, John and Tokie owned a nursery business in San Gabriel, California. The nursery owned the real property on which it operated, as well as approximately 80 acres in Trabuco Canyon in Orange County (the Trabuco Property). Henry was the only son who worked in the family's nursery business. Through a transaction involving an LLC, Henry acquired the Trabuco Property, which he sold to a real estate developer for $18 million. Consistent with his parents' desires, Henry distributed what the trial court termed a "substantial" portion of this money to long-term nursery employees and others.

Original Estate Plans

John and Tokie's estate plan consisted of a trust and pourover wills, with the trust and wills having been restated and amended in 1992. The trust included provisions for a decedent's trust and a survivor's trust, and gave the surviving spouse the power of appointment over the survivor's trust. If the power of appointment was not exercised by the survivor, the entire estate would pass to Henry.

Mission Lodge

In 2003, John was diagnosed with cancer. Because of his failing health and inability to fully care for his wife, he moved Tokie that year to Mission Lodge, a skilled nursing facility in San Gabriel near Henry. Norman lived in San Diego and Richard lived in Washington. Tokie had several health issues, including insulin-dependent diabetes, renal insufficiency, and depression. Henry regularly visited his mother, and took her to doctors' appointments, her hairdresser, and out to eat. He shopped for her and acted as her de facto conservator. He abruptly stopped seeing and caring for her in 2007, and did not attend her funeral in 2010.

Among Tokie's visitors at Mission Lodge were Mrs. Kawaguchi, a long-time family friend, and Sumako Tsushima, Tokie's cousin.

Tokie's Revised Will

In 2006, two years after John died, Tokie was put in touch with Japanese-speaking attorneys, Tetsujiro Nakamura and his son Robert Nakamura (the Nakamuras). Neither Norman nor Richard initiated the contact. After obtaining a copy of the 1992 trust, Robert Nakamura and his father met a second time with Tokie. Robert Nakamura translated the trust to Tokie in Japanese, and explained that John's one-half of the marital estate had become irrevocable upon his death and that it would go to Henry. Tokie said she wanted the three boys to share equally. Robert Nakamura explained this could only happen if Tokie left her one-half of the estate to Norman and Richard. He testified that at all times he met with her she appeared to understand what he was telling her and did not seem confused.

The Nakamuras drafted a will in accordance with Tokie's desires (the May 23, 2006 will). They provided a copy of the May 23, 2006 will to Richard Conn, an attorney with Musick, Peeler & Garrett, who had been hired by Richard to prepare a Petition for Conservatorship and a Advance Healthcare Directive.

At a third meeting with Tokie on May 23, 2006, Robert Nakamura explained the terms of all three documents to Tokie before she signed them. He translated the new two-page "very simple" May 23, 2006 will, word for word. He testified that he believed

Tokie understood she was making a new will, and stated: "We made a big point of it that if she signed it, . . . she was changing her trust to provide for her other two sons. And she definitely indicated she felt all her sons should be taken care of." He later added that he had no question she understood what she was doing and that "It was important, and that was the reason why my father asked me to also sit as translator. He wanted to make it absolutely clear what was going on." Tokie signed all three documents in the presence of the Nakamuras and her cousin Sumako Tsushima. Robert Nakamura testified that at no time was he acting under the direction of Richard or Mrs. Kawaguchi.

Legal Proceedings

Henry filed a petition for probate of will and letters testamentary, seeking to be appointed executor of Tokie's 1992 will. Norman filed a petition for probate of will and letters testamentary, seeking to be appointed executor of Tokie's May 23, 2006 will. Henry filed a first amended will contest and opposition to Norman's petition for probate, alleging that Tokie lacked testamentary capacity to execute the May 23, 2006 will, and that the will was procured by undue influence. At stake was approximately $1.6 million left in the trust.

The case proceeded to a bench trial over 13 days. Seven witnesses testified, including the parties' expert witnesses in psychiatry. The trial court also considered portions of the deposition testimony of at least 15 additional witnesses, as well as numerous exhibits. After the parties' opportunity to object to the trial court's proposed statement of decision, the court issued a final 22-page statement of decision. The court found that Tokie had testamentary capacity and intent at the time she executed the May 23, 2006 will, and that the will was not procured by undue influence. The court denied Henry's will contest and admitted the May 23, 2006 will to probate. Henry filed this appeal; Norman has requested $25,000 in sanctions for the filing of a frivolous appeal.

DISCUSSION

I. Forfeiture of Substantial Evidence Challenge

"'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld. As a general rule, therefore, we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

When an appellant challenges the sufficiency of the evidence, the opening brief must set forth "*all* the material evidence on the point" and not merely state facts favorable to the appellant. (*Stewart v. Union Carbide Corp*. (2010) 190 Cal.App.4th 23, 34, italics added.) An appellant fails to meet this requirement when it "cites the evidence in its favor, points out the ways in which (it contends) it controverted or impeached [the other party's] evidence, and interprets the evidence in the light most favorable to itself." (*Id*. at p. 34.) An appellant must present a "fair summary" of all the evidence and "'cannot shift this burden onto respondent,'" nor can it require the reviewing court to "'undertake an independent examination of the record.'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409–410.) When an appellant fails to set forth all of the material evidence, the claim of insufficient evidence is waived or forfeited. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 713–714; *Arechiga v. Dolores Press, Inc*. (2011) 192 Cal.App.4th 567, 571–572; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52–53.)

The statement of facts set forth above is largely taken from the trial court's statement of decision, Norman's respondent's brief and our own review of the record, rather than from Henry's 75-page opening brief. While Henry cursorily cites some of the evidence favorable to Norman (including Henry's own attempts to unduly influence and

shame his mother), Henry's opening brief presents an incomplete and largely one-sided record of the evidence by citing mostly to the evidence favorable to him (and repeatedly citing this same evidence). It is our opinion that Henry has failed to meet his appellate burden of setting forth *all* the material evidence in his opening brief necessary for us to evaluate whether substantial evidence supported the trial court's findings. We therefore find that Henry has forfeited his substantial evidence challenge.

II. Alternatively, Substantial Evidence Supports the Trial Court's Findings

A. Testamentary Capacity

The law presumes that a testator has testamentary capacity. (Prob. Code, § 810, subd. (a).) The presumption is not affected solely by mental disability or physical disorder. (Prob. Code, § 810, subd. (b).) Rather, a judicial determination that a person lacks the legal capacity to perform a specific act "should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." (Prob. Code, § 810, subd. (c).)

Probate Code section 6100.5 provides that "An individual is not mentally competent to make a will if at the time of making the will either of the following is true: [¶] (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will. [¶] (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done."

The contestant of a will has the burden of proof on the lack of testamentary capacity, intent, and undue influence. (Prob. Code, § 8252, subd. (a).)

In its statement of decision, the trial court spent several pages discussing the evidence supporting its finding that Tokie had testamentary capacity at the time she executed the May 23, 2006 will. The trial court relied on the testimony of Robert

Nakamura that he explained the terms of the "simple" May 23, 2006 will to Tokie at the time of execution and that she understood and appreciated the significance of executing the will. The trial court found this testimony credible. Contrary to Henry's assertions, we are bound by a trial court's finding of credibility. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 160.) This testimony alone is sufficient to support the trial court's finding of testamentary capacity. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366 ["The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions"]; Evid. Code, § 411.)

The trial court also relied on the deposition testimony of Tokie's cousin, Sumako Tsushima, who was also present when Tokie executed the May 23, 2006 will. The cousin stated that Tokie's "brain was, you know, working, working good, you know, no problem" and that Tokie was only confused for awhile about whether John, her mother and sister had died. The cousin stated that Tokie understood Henry had already taken his share, that Tokie wanted "to give her portion, the remaining portion to Richard and Norman," and that when Tokie signed the May 23, 2006 will she was of competent mind and knew she had three stepsons because "her mind was clear." The cousin also signed the will, under penalty of perjury, indicating that Tokie "appeared to be of sound mind."

The trial court also relied on the report of clinical psychologist, Toshaiki Udo, Ph.D., which was based on Dr. Udo's examinations and testing of Tokie on July 13 and 31, 2006, which was *after* she executed the May 23, 2006 will. The report indicated that despite Tokie's difficulties with short-term memory and abstract reasoning, a diagnosis of dementia was unwarranted at that time. The examination and testing spanned a period of six hours, which the court found to be comprehensive and thorough.

The trial court noted that in taking the position that his mother suffered from dementia, delusions, and other impairments that rendered her incapable of making the May 23, 2006 will, Henry relied "to a significant extent" upon the testimony of his psychiatric expert Mark Steven Lipian, M.D. While Dr. Lipian concluded from his review of Tokie's voluminous medical records and excerpts from depositions that Tokie

suffered various ailments, including paranoia, senility, hallucinations, and other forms of dementia, the court found his testimony unpersuasive because much of it "was based on hearsay, statements taken out of context and/or unsupported conclusions by others." Instead, the court "found credible" the testimony of Norman's psychiatric expert, James Randy Mervis, M.D., that Dr. Lipian's training and experience demonstrated he was unfamiliar with geriatric psychiatry and issues of testamentary capacity.

We conclude that substantial evidence supports the trial court's finding that Tokie had testamentary capacity when she executed the May 23, 2006 will.

B. Testamentary Intent

As the trial court noted, "The test to determine whether or not a testator had testamentary intent is whether or not it was intended by the instrument that the disposition was to be effective only upon death." (See *Estate of MacLeod* (1988) 206 Cal.App.3d 1235, 1240, quoting *Estate of Geffene* (1969) 1 Cal.App.3d 506, 512 ["'The basic test of testamentary intent is not the testator's realization that he was making a will, but whether he intended by the particular instrument offered for probate to create a revocable disposition of his property to take effect only upon his death'"].)

There is no question from the language of the May 23, 2006 will that it intended Tokie's share of the estate to pass to Norman and Richard upon her death. The extrinsic evidence described above supports the conclusion that the words of the May 23, 2006 will were consistent with Tokie's wishes that the disposition be effective upon her death.

C. Undue Influence

A court may set aside a will that was procured by undue influence. (Prob. Code, § 6104.) "Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency." (*Rice v. Clark* (2002) 28 Cal.4th 89, 96.) A presumption of undue influence arises upon a showing "(1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument." (*Id*. at p. 97.)

Henry argued that the May 23, 2006 will was procured by the undue influence of Richard and Mrs. Kawaguchi. The trial court found that a confidential relationship existed between Tokie and Richard, as they were mother and son. It also found that Richard actively participated in procuring the preparation of the May 23, 2006 will, as evidenced by his contact with the Nakamuras. But the trial court found that Richard and Norman were not unduly benefitted by the May 23, 2006 will, and that neither Richard nor Mrs. Kawaguchi were involved in determining the contents of the will.

Substantial evidence supports this finding. As noted above, Robert Nakamura testified that at no time was he acting under the direction of Richard or Mrs. Kawaguchi, he drafted the May 23, 2006 will in accordance with Tokie's wishes, and he had no question that she understood the terms of the will. Tokie's cousin, Sumako Tsushima, testified in her deposition that Richard did not tell her to be present for the signing of the May 23, 2006 will or to keep it a secret from Henry. The cousin did not hear Mrs. Kawaguchi giving directions, orders or commands to Tokie about how to leave her share of the estate, and did not believe that Tokie was intimidated by Mrs. Kawaguchi or that Tokie would do something just because Mrs. Kawaguchi told her to do it.

The trial court also relied on the deposition testimony of Jackson Chen, Tokie's court-appointed attorney. Notes of his conversations with Tokie reflected that she wanted Norman and Richard to share in the estate, as well as Henry. This understanding of Tokie's wishes was also confirmed by the deposition testimony of attorney Richard Conn.

Finally, the trial court noted that Henry, himself, had expended "substantial effort" to bring about a different disposition, including by bringing family members from Japan to place pressure on Tokie. The court appropriately concluded that Tokie's resistance to these "considerable efforts expended by Henry was a testament to the fact that Tokie could resist undue influence in order to effectuate her wishes."

We conclude that substantial evidence supports the trial court's finding that Tokie's May 23, 2006 will was not procured by undue influence.

III. Request for Sanctions

Norman request sanctions of $25,000 pursuant to Code of Civil Procedure section 907, which provides that "[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

"An appeal may be found frivolous and sanctions imposed when the appeal (1) 'is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment,' or (2) 'indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.'" (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1081, quoting *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

We tend to agree that this appeal is without merit and that it was most likely brought by Henry to delay and prevent his brothers from receiving their inheritance while forcing them to incur additional attorney fees and costs. Nevertheless, we decline to impose sanctions.

DISPOSITION

The trial court's order is affirmed. Norman is entitled to recover his costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT